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ARTICLES

THE JURY IS STILL OUT ON THE NEED FOR AN INTERNATIONAL CRIMINAL COURT

Michael P. Scharf*

I. INTRODUCTION

After languishing in the shadow of international ambivalence for some seventy years,¹ the proposal for the creation of an international criminal court is enjoying a modern revival. Within the last year, the United Nations International Law Commission ("ILC"),² the U.N. Crime Congress, a conference of international scholars in Italy, and the International Law Section of the American Bar Association ("ABA") all have endorsed the concept of an international criminal court.³ Moreover, the 101st Congress (1989-90), on its final day, passed legislation calling on the Executive Branch to explore the need for the establishment of such a court and requiring the Executive Branch to report its findings by October 1, 1991.⁴ Even senior officials of the U.S. Department of State recently have acknowledged that "the time is probably riper than ever to

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1. The first effort to establish an international criminal tribunal was proposed in the Treaty of Versailles, for the purpose of prosecuting "Kaiser Wilhelm II for 'Crimes Against Peace'; German Military Personnel for 'War Crimes'; and Turkish Officials for 'Crimes Against Humanity.'" M. Cherif Bassiouni, *A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality, Including the Establishment of an International Criminal Court* B:4, prepared for the United Nations Crime Prevention and Criminal Justice Branch (February 1, 1990, amended April 20, 1990) ("Bassiouni Report"). For a summary of past attempts to create an international criminal court, see notes 12-33 and accompanying text.

2. The International Law Commission was established by United Nations Resolution 174 (II) of November 21, 1947, and given the responsibility of carrying out Article 13(1) of the United Nations Charter, which provides: "The General Assembly shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of the international law and its codification." *The Work of the International Law Commission* 4 (United Nations, 3d ed 1980).

3. See notes 34-44 and accompanying text for a discussion of these recent developments.

4. S 16216, 101st Cong, 2d Sess (October 2, 1990), 142 Cong Rec (October 19, 1990) ("Amend No 3068 to FY Foreign Operations Bill") (statement of Senator Specter). See notes 45-46 and accompanying text.

look closely at [the proposal to create such a tribunal]."⁵ While these developments have been accompanied by a torrent of commentary in favor of the concept,⁶ until now the proposal has not been publicly subjected to anything approaching critical scrutiny.

In 1989, the United Nations General Assembly proclaimed the 1990s to be "The Decade of International Law."⁷ Moreover, 1990, which witnessed both the devolution of the Cold War and the effective use of the United Nations to coalesce universal support for international action against Iraq for its invasion of Kuwait, was a year of renewed optimism for international institutions. It is therefore fitting that proposals for an international criminal court should, at this time, get a fresh look from the international legal community. Towards this end, in the words of the U.S. Representative to the United Nations Sixth (Legal) Committee ("U.N. Sixth Committee"),⁸ it is "essential that both the potential benefits and problems which such a court could create be carefully examined and balanced, lest we risk doing more harm than good."⁹ The purpose of this article is to undertake such a critical examination.

This article begins by recounting the history of the concept of an international criminal court, including a discussion of recent develop-

5. Testimony of Undersecretary of State Robert Kimmitt before the House Foreign Affairs Committee, September 12, 1990, quoted in Supplemental Statement of Senator Arlen Specter for the Congressional Record Regarding the Need for an International Criminal Court 2 (October 27, 1990) ("Supplemental Statement of Senator Arlen Specter") (on file with the Department of State's Office of the Assistant Legal Adviser for Law Enforcement and Intelligence ("L/LEI")); see also note 51 and accompanying text.

6. For example, on June 18, 1990, Senator Arlen Specter (R-Pa.) optimistically exclaimed, "[T]he progress made on the need for and creation of [an] international criminal court has taken a quantum leap forward." 16 Intl L & Trade Perspective 4, 4 (June 1990). Similarly the ILC stated recently that "a number of developments in international relations and international law have contributed to making the establishment of an international criminal court more feasible than when the matter had been studied earlier. . . ." *Report of the International Law Commission on the Work of its Forty-Second Session, 1 May-20 July 1990*, 45 UN GAOR Supp No 10 at 45, UN Doc A/45/10 (1990) ("1990 ILC Report"). As one United Nations Representative stated recently, "The time is now propitious for the formalization of an international criminal jurisdiction to deal with international criminal activities of both individuals and entities." Statement by the Permanent Representative of the Republic of Trinidad and Tobago, Marjorie R. Thorpe, in the UN Sixth Committee of the General Assembly on Agenda Item 152: International Criminal Responsibility of Individuals and Entities engaged in the Illicit Trafficking in Drugs Across National Frontiers, and other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction Over Such Crimes at 2 (November 10, 1989).

Statements made in the United Nations Sixth Committee in 1989 and 1990 are cited as "Statement by —, Representative of — to the UN Sixth Committee, on — at —." Copies of the statements made before the Sixth Committee cited in this article are on file with L/LEI.

7. Supplemental Statement of Senator Arlen Specter at 2 (cited in note 5).

8. The U.N. Sixth Committee oversees the work of the ILC and provides policy guidance to the Commission. See *The Work of the International Law Commission* at 18-20 (cited in note 2).

9. Statement by Jason Abrams, Representative of the United States to the UN Sixth Committee, on November 14, 1989 at 1.

ments and a critique of the ILC's latest report on the subject. It then analyzes how the establishment of an international criminal court might facilitate the prosecution of international criminals as seen against the backdrop of existing mechanisms for international law enforcement. The focus then moves to the problems that creating this court might pose, including those attendant to each of the several proposed jurisdictional models for an international criminal court. This article concludes that, while the creation of an international criminal court might provide an incremental benefit to the current system of international law enforcement, the costs and risks involved in creating such a tribunal are great, and even if established, many of its purported benefits are unlikely to materialize.

As this article goes to press, a Blue Ribbon Committee of the ABA, the Judicial Conference of the United States, and the U.S. Department of State are preparing studies on the need for an international criminal court.¹⁰ This article is not intended to preview their findings, but to offer an independent analysis of the issue.

II. BACKGROUND

A. History: Seventy Years of Inaction

As a recent State Department Report notes, "the idea of creating an international criminal court has had a long, and largely disappointing history."¹¹ The first proposal for an international criminal tribunal emerged at the end of World War I at the Paris Peace Conference of 1919.¹² Although the Treaty of Versailles provided for the trial of war criminals, including the former head of the German State, by multinational military tribunals, none of these tribunals were established and Kaiser Wilhelm II was never brought to trial.¹³ In 1937, the League of Nations finalized a convention to establish an international criminal court;¹⁴ however, the Convention never entered into force as only one nation ratified it.¹⁵ The initiative ultimately perished with the outbreak of World War II.

10. See notes 42, 45, 50 and accompanying text.

11. Letter from Janet G. Mullins, Assistant Secretary for Legislative Affairs, US Department of State, to Congressman Dante Fascell, Chairman of the House Committee on Foreign Affairs (December 12, 1990) ("State Department Report") (copy on file with L/LEI).

12. See International Law Commission, *Historical Survey of the Question of International Criminal Jurisdiction*, May 27, 1949, UN Doc A/CN.4/7 at 3 ("ILC Historical Survey"). See also Bassiouni Report at B:4 (cited in note 1).

13. *Id.*

14. Convention for the Creation of an International Criminal Court, League of Nations Doc C.547 M.384 1937 V (1937) ("League of Nations Convention") (never entered into force).

15. Geoffrey Levitt, Is "Terrorism" Worth Defining?, 13 Ohio N U L Rev 97, 98 note 3 (1986).

To date, the only international criminal tribunals which actually have been established were the *ad hoc* Nuremberg and Tokyo tribunals.¹⁶ The Allies created these tribunals after World War II to try individuals accused of war crimes and crimes against humanity.¹⁷ Although the ILC has asserted that this demonstrates that the creation of an international criminal court is "juridically and politically possible,"¹⁸ the experience gained through the Nuremberg and Tokyo tribunals is largely inapplicable to the creation of a standing international criminal court in our time.¹⁹ Both tribunals were convened temporarily, under exceptional post-war circumstances. They were created and controlled by a small circle of nations that were able to exercise sovereignty in the defeated countries, and applied to a specific group of identified and apprehended individuals for which there existed unusual consensus among victor nations to punish.²⁰ Germany and Japan did not participate in the formation and management of these tribunals.²¹ Finally, the Nuremberg and Tokyo trials have been criticized severely for violating fundamental due process concepts through pre-judgment of guilt, judicial bias, the application of *ex post facto* laws, judges with unclean hands, and procedural irregularities.²²

16. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal (Nuremberg), 59 Stat 1544, 82 UNTS 279 (signed and in force August 8, 1945) ("London Agreement"); International Military Tribunal For the Far East Proclaimed at Tokyo, Charter of the International Military Tribunal (Tokyo), (signed and in force January 19, 1946; amended April 26, 1946) TIAS No 1589 ("Tokyo Charter").

17. See M. Cherif Bassiouni, *2 International Crimes: Digest/Index of International Instruments 1815-1985* 443 (Oceana, 1985).

18. See *Report of the International Law Commission Covering Its Second Session 5 June - 29 July 1950*, 5 UN GAOR Supp No 12 at ¶ 136, UN Doc A/1316 ("1950 ILC Report"), reprinted in Benjamin B. Ferencz, *2 An International Criminal Court: A Step Toward World Peace* 265 (Oceana, 1980).

19. See State Department Report at 2 (cited in note 11). The Nuremberg and Tokyo Tribunals "provide little guidance for the creation of an International Criminal Court with jurisdiction to hear a broader class of claims against a much broader number of individuals." *Id.* For a general historical overview, see also *ILC Historical Survey* at 25-29 (cited in note 12).

20. See *ILC Historical Survey* at 25-29 (cited in note 12).

21. *Id.*

22. See generally Arnold C. Brackman, *The Other Nuremberg* (Morrow, 1987); Robert E. Conot, *Justice at Nuremberg* (Harper & Row, 1983); Ann Tusa and John Tusa, *The Nuremberg Trial* (Atheneum Press, 1983); Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton U Press, 1971). As noted in these works, judges at Nuremberg and Tokyo oversaw the collection of evidence, participated in the selection of defendants, and judged these defendants in a political arena. Critics of the tribunals note that this mix of roles oversteps even the civil law countries' notions of the role of the judiciary and renders objectivity impossible. They have also found fault with the composition of the bench; only victorious states were represented. In addition, they have asserted that the trial of defendants for violating crimes subsequently defined to encompass the defendant's behavior was a violation of fundamental legal precepts. Further, they point out that the states which tried the Nuremberg and Tokyo defendants were guilty of many of the same crimes for which they convicted and hanged war prisoners: Soviet judges convicted defendants for waging aggressive war despite the forcible Soviet annexation of the Baltic States, U.S. judges convicted defendants for

The United Nations first examined the possibility of establishing a standing international criminal court in 1948 by calling on the newly established ILC to study "the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions."²³ The Commission, having studied the matter at its first two sessions, 1949 and 1950, concluded that the establishment of such an organ would be both possible and desirable, but that it should not be a chamber of the International Court of Justice.²⁴

After considering the Commission's report, the United Nations General Assembly established a committee composed of seventeen Member States, which prepared a draft statute for an international criminal court.²⁵ Two years later, a second committee prepared a revised statute.²⁶ The project stalled, however, along with a parallel effort to create the Draft Code of Offences Against the Peace and Security of Mankind ("Draft Code"), due to the lack of a definition of aggression.²⁷ The project continued to lay dormant and, in 1957, the U.N. General Assembly decided that neither the creation of an international criminal court nor the Draft Code should be included in its agenda until progress was made in arriving at a generally accepted definition of aggression.²⁸ After adopting a definition of aggression in 1974,²⁹ the General Assembly invited the ILC to resume its work on the Draft Code, but made no mention of the establishment of an international criminal court.³⁰

crimes against humanity despite the dropping of the atomic bombs, and Admiral Karl Dönitz was tried for violating the laws of war by conducting unrestricted submarine warfare, despite the fact that the Allied forces conducted similar warfare throughout the war. Finally, critics note that nearly every procedural protection under the Tokyo Charter was subject to tribunal discretion, and that procedural protections under the London Charter were willfully violated. Critics assert that such irregularities were particularly egregious because the sentence passed was often death, and the court was a court of no appeal.

23. 1990 ILC Report at ¶ 104 (cited in note 6). This effort was undertaken by the ILC pursuant to UN GA Res 260 B III, UN Doc A/810 (1948).

24. See 1950 ILC Report at ¶ 145 (cited in note 18).

25. Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction), 7 UN GAOR Supp No 11 at 21, UN Doc A/2136 (1952).

26. Revised Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction), 9 UN GAOR Supp No 12 at 23, UN Doc A/2645 (1954).

27. UN GA Res 898 (IX), 12 UN GAOR Supp No 18 at 50, UN Doc A/3805 (1957).

28. Id. See D.H.N. Johnson, *The Draft Code of Offences Against the Peace and Security of Mankind*, 4 Intl & Comp L Q 445 (1955), for the text and a discussion of the Draft Code.

29. Definition of Aggression, UN GA Res 3314 (XXIX) (Annex-Definition of Aggression), 29 UN GAOR Supp No 31 at 142, UN Doc A/9631 (1974), reprinted in 1990 ILC Report at note 52 (cited in note 6).

30. Draft Code of Offences Against the Peace and Security of Mankind, UN GA Res 36/106, 36 UN GAOR Supp No 51 at 239, UN Doc A/36/51 (1981), reprinted in 1990 ILC Report at note 52 (cited in note 6).

In 1980, the U.N. Human Rights Commission endorsed a proposal by an *ad hoc* working group of experts on Southern Africa, which contained the Draft Statute for the Creation of an International Criminal Court for the Suppression and Punishment of the Crime of Apartheid and other International Crimes.³¹ Despite this endorsement, the General Assembly has taken no further action since 1980. Consistent with the ambivalence displayed towards prior efforts, this effort largely has been ignored by the international community.

The ILC recently concluded that these past efforts, although they did not come to fruition for different reasons, are useful background for gauging the feasibility of an international criminal court.³² These efforts, however, demonstrate only that for nearly a century the international community has displayed a persistent inability to move beyond the academic exercise of repeatedly drafting statutes for an international criminal court.³³

B. Recent Developments: A Modern Revival

After nearly twenty years of silence on the issue, the U.N. General Assembly responded to a proposal by the Permanent Representative of Trinidad and Tobago³⁴ by passing Resolution 44/39, which called on the ILC to devote attention to the issue of establishing an international criminal court in its report on its forty-second (1990) session.³⁵ This action by the U.N. stimulated new interest in the long dormant proposal, and was

31. See 1990 ILC Report at ¶ 113 (cited in note 6); Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid, January 19, 1981 ("Apartheid Convention Draft Statute"), UN Doc E/CN.4/1426. The draft statute relied upon the jurisdictional principle established in Article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"), 1015 UNTS 243 (signed November 30, 1973; in force July 18, 1976), which provides that persons charged with the crime of *apartheid* may be tried "by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction."

32. 1990 ILC Report at ¶ 103 (cited in note 6).

33. The International Section of the American Bar Association has noted that these previous efforts to draft a statute for an international criminal court were "regarded by many as of academic interest only." *American Bar Association Section of International Law and Practice Report to the House of Delegates*, August 3, 1990, reprinted in 6 Intl Enforcement L Rptr 284, 284 (August 1990) ("1990 ABA Report").

34. Other sponsors of the resolution were: Antigua and Barbuda, Bahamas, Barbados, Belize, Comoros, Costa Rica, Grenada, Guyana, Jamaica, Libyan Arab Jamahiriya, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Vanuatu. UN GA Res 44/39, 44 UN GAOR Supp No 49 at 1, UN Doc A/44/49 (1989), reprinted in 1990 ILC Report at ¶ 100 (cited in note 6).

35. The 1990 ILC Report, published on August 29, 1990, cautiously endorsed the creation of an international criminal court. 1990 ILC Report at ¶ 157 (cited in note 6). For a detailed discussion of the 1990 ILC Report, see notes 57-71 and accompanying text.

quickly followed by a series of other developments, each fueling a growing sense of optimism about the creation of an international criminal court.

Six months after the passage of Resolution 44/39, an international conference of experts on international criminal policy considered the issue at a June 24-26, 1990, meeting held in Siracusa, Italy under the auspices of the Italian Ministry of Justice in cooperation with the U.N. Crime Prevention and Criminal Justice Branch.³⁶ The conference participants adopted a draft statute for the creation of an international criminal court, based primarily on the *Apartheid* Convention Draft Statute.³⁷ The new draft statute would give the international criminal court concurrent jurisdiction over cases submitted to it by states having original jurisdiction over certain offenses listed in existing international conventions.³⁸ As an alternative, this draft statute provides for a transfer of proceedings model, under which proceedings may be transferred to the international criminal court from a state having original jurisdiction.³⁹

On August 3, 1990, two months after the conference in Siracusa, the ABA International Law Section adopted a resolution supporting the establishment of an international criminal court with its jurisdiction limited to offenses under the 1988 U.N. Narcotics Convention.⁴⁰ The ABA International Law Section added the following caveat to its support of an international criminal court:

No person shall be tried before the court unless jurisdiction has been conferred upon the court by the state or states of which he is a national and by the state or states in which the crime is alleged to have been committed.⁴¹

36. Christopher L. Blakesley, *Committee on Experts Considers International Criminal Court Proposal*, 6 Intl Enforcement L Rptr 249, 249 (July 1990).

37. Blakesley, 6 Intl Enforcement L Rptr at 250 (cited in note 36). The *Apartheid* Convention is cited in note 31.

38. See Blakesley, 6 Intl Enforcement L Rptr at 252-53 (cited in note 36).

39. Id at 253. For a discussion of this proposal, see notes 165-77 and accompanying text.

40. 1990 ABA Report at 284 (cited in note 33). In 1978, the ABA House of Delegates adopted a similar resolution urging the Department of State to "open negotiations for a Convention for the establishment of an International Criminal Court with jurisdiction expressly limited to (a) international aircraft hijacking as defined in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; (b) violence aboard international aircraft as defined in the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; (c) crimes against diplomats and internationally protected persons as defined in the 1972 Convention on the Prevention and Punishment of Crime Against Diplomatic Agents and Other Internationally Protected Persons; and (d) the crimes of murder and kidnapping, defined in clause (c), when committed or directed against any group of five or more nationals of a state other than the state of the alleged perpetrator of the crime." ABA House of Delegates Resolution Regarding an International Criminal Court (February 13, 1978) (copy on file with L/LEI). The Narcotics Convention is formally known as the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN Doc E/Conf 82/15 (signed December 20, 1988) ("UN Narcotics Convention").

41. Id.

At the time, the ABA House of Delegates had before it a Milwaukee Bar Association report recommending that the ABA pledge support for the creation of an international criminal court with jurisdiction over a broader array of international offenses. Faced with two overlapping recommendations, the ABA Board of Governors sent them back for reconciliation. No further action was taken on the resolutions. Instead, the ABA recently approved a proposal "that the American Bar Association assist in the exploration of the need for the establishment of an international criminal court and in the evaluation of proposals for such a court by appointing a committee of experts, a Blue Ribbon Committee," which will present its report to the Board of Governors and the House of Delegates in time for their August 1991 meetings.⁴²

On September 6, 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a report endorsing the ILC's efforts to explore the possibility of establishing an international criminal tribunal.⁴³ The Crime Congress report also suggests that states should explore the possibility of establishing separate international criminal courts of regional jurisdiction.⁴⁴

Most recently, on October 26, 1990, the United States Congress passed the Foreign Operations Appropriations Act (HR 5114-88). Section 599E of the Act calls on the United States to "explore the need for the establishment of an international criminal court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions. . . ."⁴⁵ The

42. American Bar Association Section of International Law and Practice Report to the House of Delegates, February, 1991 ("1991 ABA Report") (copy on file with L/LEI).

43. See Annex to Draft Resolution V: Measures Against International Terrorism-Terrorist Criminal Activities: Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, September 7, 1990, UN Doc A/Conf 144/25 ("UN Crime Congress Report") (copy on file with L/LEI). The U.N. Crime Congress Report states that "[t]he International Law Commission should be encouraged to continue to explore the possibility of establishing an international criminal court or some other international mechanism to have jurisdiction over persons who have committed offenses (including offenses connected with terrorism or with illicit trafficking in narcotic drugs or psychotropic substances) in accordance with General Assembly Resolution 44/39 of 4 December 1989." *Id.* at ¶ 31.

44. *Id.*

45. The legislation provides in pertinent part as follows:

(b) It is the sense of Congress that —

(1) the United States should explore the need for the establishment of an International Criminal Court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions; and

(2) the establishment of such a court or courts for the more effective prosecution of international criminals should not derogate from established standards of due process, the rights of the accused to a fair trial and the sovereignty of individual nations.

(c) The President shall report to the Congress by October 1, 1991, the results of his efforts in regard to the establishment of an International Criminal Court to deal with criminal acts defined in international conventions.

legislation further requires the President and the United States Judicial Conference to report to the U.S. Congress the results of their efforts by October 1, 1991.⁴⁶

Representatives Jim Leach and Robert Kastenmeier originally proposed this legislation as House Concurrent Resolution 66, which stated that the United States "should pursue the establishment of an International Criminal Court to assist the international community in dealing more effectively with those acts of terrorism, drug trafficking, genocide, and torture that are condemned as criminal acts in the international conventions [listed]."⁴⁷ The resolution further urged the President to convene an international conference for purposes of negotiating a multilateral convention establishing an international criminal court.⁴⁸ The Department of State, however, warned that "it would be premature for the U.S. Congress to go on record at this time as supporting the general concept of creating an International Criminal Court."⁴⁹ Thus, the Department worked with Congressional staff members "to develop mutually acceptable legislation on this issue," which resulted in the version of the legislation that Congress ultimately enacted.⁵⁰

Previously, both the Reagan and Bush Administrations' positions on the creation of an international criminal court reflected "cautious pessimism."⁵¹ However, during Congressional hearings in September 1990, on the Persian Gulf crisis, when Representative Leach raised the possibility of creating an international criminal tribunal to try Iraqi President Saddam Hussein for war crimes,⁵² both Secretary of State James Baker and Undersecretary of State Robert Kimmitt responded that the time is probably ripe to look seriously at the idea of creating an international criminal court.⁵³

On December 12, 1990, the Department of State transmitted a report to the House Foreign Affairs Committee in response to the Committee's renewed request for the Department's views on the original version of House Concurrent Resolution 66 (notwithstanding the recent passage

(d) The Judicial Conference of the United States shall report to the Congress by October 1, 1991, on the feasibility of, and the relationship to, the Federal Judiciary of an International Criminal Court.

Amend No 3068 to FY Foreign Operations Bill (cited in note 4).

46. *Id.*

47. H Con Res 66, 101st Cong, 1st Sess at ¶ 1 (copy on file with L/LEI). A brief reference to this Concurrent Resolution appears in H 529, 135 Cong Rec (March 2, 1989).

48. *Id.* at ¶ 4.

49. State Department Report at 1 (cited in note 11).

50. *Id.* at 3.

51. Supplementary Statement of Senator Arlen Specter at 5 (cited in note 5).

52. *Id.* at 1 (referring to questions asked of Secretary of State James Baker at the Hearing of the House Foreign Affairs Committee, September 4, 1990).

53. *Id.* at 1-2.

of a revised version of this legislation). The State Department Report outlined the reasons why the Department believed it would not be appropriate at this time for the Congress to go on record as endorsing an international criminal court: (1) the possibility that such a court could become politicized; (2) the reluctance of most states to submit their nationals to international jurisdiction; (3) the failure of any proposal to address adequately the many practical issues involved in creating such a court; and (4) the possibility that efforts to establish an international criminal court could divert resources from other, more practical means for fighting trans-border crime.⁵⁴ The report reaffirmed that, pursuant to the recently passed legislation, the State Department would report to the Congress by October 1, 1991, the results of its efforts to explore the need for an international criminal court and, to that end, that it would "participate in discussions of the subject in the U.N. and other fora where the subject may arise."⁵⁵ Turning to the recently published report of the ILC, the State Department Report noted that although the ILC's latest effort describes many possible options for an international criminal court, it fails to analyze in any detail the advantages and disadvantages of those options, and leaves a host of other critical questions unanswered.⁵⁶

C. The 1990 ILC Report: Many Questions, Too Few Answers

The 1990 *ILC Report* begins by surveying previous efforts to establish an international criminal court.⁵⁷ It then briefly discusses some of the potential benefits of and obstacles to establishing such a court.⁵⁸ The bulk of the report is devoted to identifying various options with regard to five categories of issues: jurisdiction and competence of the court; structure of the court; legal force of the court's judgments; certain other questions, including penalties, implementation of judgments and financing; and possible international trial mechanisms other than an international tribunal.

Although the 1990 *ILC Report* purports to be "an in-depth examination" of the question,⁵⁹ it reads instead like a laundry list of potential issues and options associated with the establishment of an international criminal court, with minimal substantive discussion of any particular issue

54. See State Department Report at 2-3 (cited in note 11).

55. *Id.* at 3.

56. *Id.* According to the State Department Report, "[T]he [1990 ILC] report does not analyze in any detail the advantages and disadvantages of the options. Nor does it address, among other things, crucial questions about prosecution, enforcement, rights of the accused, and potential interference with existing national and international legal mechanisms." *Id.*

57. See 1990 *ILC Report* at ¶ 103-15 (cited in note 6).

58. *Id.* at ¶ 117-21.

59. *Id.* at ¶ 94.

or option. The report briefly mentions some of the general problems a proposal for an international criminal court would encounter,⁶⁰ but fails to discuss how these problems relate to the specific models for the court outlined elsewhere in the report.

The report's most glaring deficiency is that it fails to answer the underlying question of how the establishment of an international criminal court would facilitate the prosecution of international criminals. Although it acknowledges that prosecution of offenders under the existing system is "carried out effectively in national courts,"⁶¹ it provides no persuasive analysis suggesting that the existing system is deficient in a manner that would justify the costly, burdensome, and possibly contentious creation of an international court system (including a prosecution arm and a detention facility). More specifically, there is nothing in the report that explains why states would be more willing to turn offenders over to an international court than they would be to prosecute or extradite them.

Moreover, while the report states that "proposals for a court must take into account the danger of disrupting satisfactory implementation of the existing system,"⁶² it lacks any description of what this danger might be and how to avoid it. The report even fails to discuss how an international criminal court would work with existing national and international systems of criminal law enforcement.

In addition, the report notes the risk that an international criminal court could develop into a politicized body,⁶³ but responds to this potential problem only by asserting that "the Commission is convinced that [the court's] independence and integrity may be guaranteed by devising a structure with adequate safeguards."⁶⁴ The only safeguard described in the report, however, relates solely to the selection of judges.⁶⁵ The report does not address the difficult issue of guaranteeing the neutrality of the prosecution and enforcement arms of the international court. Similarly, the report asserts without any elaboration that the international court "could be expected to provide better safeguards against arbitrary proceedings and for the protection of the rights of the accused than the existing system of universal jurisdiction."⁶⁶ Finally, the report skirts a number of practical matters, such as rules of procedure and evidence, conduct of the

60. See *id.* at ¶ 118-21.

61. *Id.* at ¶ 118.

62. *Id.*

63. See *id.* at ¶ 121.

64. *Id.*

65. *Id.* at ¶ 142.

66. *Id.* at ¶ 121.

investigation and prosecution, and the likely cost of establishing such a court and how it would be funded.⁶⁷

The report concludes that "the Commission's examination of the question reflected a broad agreement, in principle, on the desirability of the establishment of a permanent international criminal court."⁶⁸ The report recognizes, however, that establishing an international criminal court will succeed "only if widely supported by the international community."⁶⁹ It is unlikely that the international community will be ready to support the creation of an international criminal court until it has had the chance to examine a concrete proposal in detail, and until it is convinced that the proposal will provide something that the present national and international systems for criminal law enforcement are lacking. In this vein, the United States Representative to the U.N. Sixth Committee, commented on the 1990 ILC Report:

[The United States] would suggest that the Commission be requested to continue its analysis in more detail, with particular emphasis on the practical questions attendant on the Court's relationship to the existing system of enforcement. After we have had time to consider the Commission's more detailed analysis, we will all be in a better position to evaluate which model of International Criminal Court, if any, will be most likely to improve the ability of the international community to combat crimes that affect us all.⁷⁰

The other members of the Sixth Committee agreed with the U.S. Representative and adopted a resolution inviting the ILC "to consider further and analyse the issues raised in its report on the question" of establishing an international criminal court.⁷¹

The next section of this article addresses those questions left unanswered by the 1990 ILC Report. Specifically, it examines (1) the deficiencies in the existing system of international law enforcement which might warrant the creation of an international criminal court, and (2) the potential problems that a model for an international criminal court would have to overcome to be acceptable.

67. Statement by John Knox, Representative of the United States to the UN Sixth Committee, on November 7, 1990 at 4.

68. See 1990 ILC Report at ¶ 155 (cited in note 6).

69. Id at ¶ 157.

70. Statement by John Knox at 4 (cited in note 67).

71. See Draft Code of Crimes Against the Peace and Security of Mankind, November 19, 1990, UN Doc A/C.6/45/L.19 at 2.

III. WEIGHING THE BENEFITS AND COSTS

A. The Need for an International Criminal Court: Deficiencies of the Existing System

The need for an international criminal court must be assessed against the backdrop of the existing system for prosecuting international criminals. The current system relies on numerous international conventions which define certain offenses and require states to criminalize conduct, prosecute or extradite the transgressors,⁷² and cooperate with other states for the effective implementation of these duties. Such conventions cover crimes against peace,⁷³ aggression,⁷⁴ war crimes,⁷⁵ crimes against humanity,⁷⁶ genocide,⁷⁷ torture,⁷⁸ *apartheid*,⁷⁹ drug offenses,⁸⁰ counter-

72. Extradition is the surrender by one state (the requested state) to another (the requesting state) of an individual accused or convicted of an offense within the jurisdiction of the requesting state. It requires the requesting state to be competent to try and punish the fugitive and to demand his surrender for that purpose. See M. Cherif Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 Wayne L Rev 733, 733 (1969). Some of the older conventions only require states to prosecute, and not to extradite, the transgressor; the specific obligations in this regard can be found in the explanation of the articles that follow the relevant conventions cited throughout this paper.

73. See London Agreement at Arts 3, 6(a): Art 3 (duty to cooperate in investigation and prosecution of alleged war crimes), Art 6(a) (recognition of aggression as crime against peace) (cited in note 16).

74. UN GA Res 3314 at 142, Art 5 (recognition of aggression as crime against peace) (cited in note 29).

75. See London Agreement at Art 6(b) (cited in note 16); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, [1955] 6 UST 3114, TIAS No 3362, 75 UNTS 31 (signed August 12, 1949; in force October 21, 1950): Art 49 (duty to search for and prosecute), Art 50 (recognition of crimes); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, [1955] 6 UST 3217, TIAS No 3364, 75 UNTS 85 (signed August 12, 1949; in force October 21, 1950): Art 50 (duty to search for and prosecute), Art 51 (recognition of crimes); Geneva Convention Relative to the Treatment of Prisoners of War, [1955] 6 UST 3316, TIAS No 3364, 75 UNTS 135 (signed August 12, 1949; in force October 21, 1950): Art 129 (duty to search for and prosecute), Art 130 (recognition of crimes); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, [1955] 6 UST 3516, TIAS No 3365, 75 UNTS 287 (signed August 12, 1949; in force October 21, 1950): Art 146 (duty to search for and prosecute), Art 147 (recognition of crimes); Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3 (signed June 8, 1977; in force December 7, 1978), and Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of the Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609 (signed June 8, 1977; in force December 7, 1978), reprinted in 198 Intl Rev Red Cross 1 (August-September 1977).

76. London Agreement at Art 6(c) (cited in note 16).

77. Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (signed December 9, 1948; in force January 12, 1951): Art I (recognition as international crime), Art IV (duty to criminalize), Art VI (duty to prosecute), Art VII (duty to extradite), Art VIII (duty to prevent and punish).

78. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GA Res 39/46, 39 UN GAOR Supp No 51 at 197, UN Doc A/39/51 (1985) (signed December 10, 1984; in force June 26, 1987): Art I (recognition of international crimes), Art IV (duty

feiting,⁸¹ slavery,⁸² traffic in women and children,⁸³ piracy,⁸⁴ maritime terrorism,⁸⁵ aircraft hijacking,⁸⁶ aircraft sabotage,⁸⁷ crimes against officials and diplomats,⁸⁸ and hostage taking.⁸⁹ The prosecute or extradite (*aut dedere aut judicare*) formula embodied in many of these conventions bal-

to criminalize), Art V (duty to establish jurisdiction), Art VII (duty to extradite), Art IX (duty to provide cooperation and judicial assistance).

79. International Convention on the Suppression and Punishment of the Crime of Apartheid: Arts I, III (recognition of international crimes), Art IV (duty to suppress, criminalize and prosecute), Art XI (duty to extradite) (cited in note 31).

80. UN Narcotics Convention: Art 3 (duty to criminalize and prosecute), Art 4 (jurisdiction), Art 6 (duty to extradite), Arts 7, 9, 10 (duty to provide mutual assistance) (cited in note 40); see also Single Convention on Narcotic Drugs, [1967] 18 UST 1407, TIAS No 6298, 520 UNTS 204 (signed March 30, 1961; in force December 13, 1964); Convention on Psychotropic Substances, [1979-1980] 32 UST 543, TIAS No 9725, 1019 UNTS 399 (signed February 21, 1971; in force August 16, 1976); Protocol Amending the 1961 Single Convention on Narcotic Drugs, [1976] 26 UST 1439, TIAS No 8118, 976 UNTS 3 (signed March 25, 1972; in force August 8, 1975).

81. International Convention for the Suppression of Counterfeiting Currency, 112 LNTS 371 (signed April 20, 1929; in force February 22, 1931): Art 3 (duty to punish), Arts 8, 9 (duty to prosecute or extradite), Art 16 (duty to provide judicial assistance).

82. See International Convention to Suppress the Slave Trade and Slavery, 46 Stat 2183, Treaty Ser No 778, 60 LNTS 253 (signed September 25, 1926; in force March 9, 1927): Art 2 (duty to prevent and suppress), Art 6 (duty to criminalize); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, [1967] 18 UST 3201, TIAS No 6418, 266 UNTS 3 (signed September 7, 1956; in force April 30, 1957): Art 1 (duty to abolish), Arts 3, 5, 6 (duty to criminalize and punish), Art 8 (duty to cooperate in prosecution).

83. See International Convention for the Suppression of the Traffic in Women and Children, 9 LNTS 416 (signed September 30, 1921; in force June 28, 1922): Art 2 (duty to prosecute), Art 3 (duty to punish), Art 4 (duty to extradite), reprinted in 18 Am J Intl L Supp 130 (1924).

84. United Nations Convention on the Law of the Sea, UN Doc A/Conf 62/122 (1982) (signed December 10, 1982), reprinted in 21 ILM 1261 (1982); Geneva Convention of the High Seas, [1962] 13 UST 2312, TIAS No 5200, 450 UNTS 82 (signed April 29, 1958; in force September 30, 1962).

85. See Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, with Related Protocol, S Treaty Doc No 101-1, 101st Cong, 1st Sess 1 (signed March 10, 1988), reprinted in 27 ILM 668 (1988): Art 3 (definition of offense), Art 5 (duty to punish), Art 6 (duty to establish jurisdiction), Art 10 (duty to prosecute), Art 11 (duty to extradite), Art 12 (duty to render mutual legal assistance).

86. Convention for the Suppression of Unlawful Seizure of Aircraft, [1971] 22 UST 1641, TIAS No 7192, 860 UNTS 105 (signed December 16, 1970; in force October 14, 1971): Art I (recognition of crimes), Art II (duty to punish), Art IV (duty to establish jurisdiction), Art VI (duty to apprehend), Art VII (duty to prosecute or extradite), Art X (duty to cooperate in prosecution).

87. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, [1973] 24 UST 565, TIAS No 7570, 974 UNTS 177 (signed September 23, 1971; in force January 26, 1973): Art I (recognition of crimes), Art 3 (duty to punish), Art 5 (duty to establish jurisdiction), Art 6 (duty to apprehend), Art 7 (duty to prosecute or extradite), Art 11 (duty to cooperate in prosecution).

88. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, [1976-77] 28 UST 1975, TIAS No 8532, 1015 UNTS 243 (signed December 14, 1973; in force February 20, 1977): Art 2 (recognition of crimes), Art 3 (duty to establish jurisdiction), Arts 6, 7 (duty to prosecute or extradite), Art 10 (duty to provide judicial assistance).

89. International Convention Against the Taking of Hostages, UN GA Res 34/146 (XXXIV), 34 UN GAOR Supp No 46 at 245, UN Doc A/34/146 (1979) (signed December 17, 1979; in force June 4, 1983), reprinted in 18 ILM 1456 (1979): Art 1 (recognition of crimes), Art 2 (duty to punish), Art

ances the enforcement interest of the international community in punishing offenders with the sovereignty interest of individual states in controlling sensitive matters of national security, suppression of crime, and maintenance of law and order. Countries choosing not to extradite a suspected offender found in their territory must submit the case to domestic authorities for prosecution.

Although there are gaps in the criminal conduct covered,⁹⁰ and a number of countries have not become a party to these conventions, experience has shown the existing system to be increasingly effective in bringing international criminals to justice.⁹¹ As the Representative of China to the U.N. Sixth Committee recently noted, "Trafficking in drugs and other international criminal activities such as hijacking ha[ve] been reasonably well handled by domestic courts, augmented by the international criminal justice system known as 'prosecute or extradite.'"⁹² The Canadian Representative, expressing similar sentiments, explicitly took exception with the 1990 *ILC Report* conclusion that there exists broad agreement on the desirability of establishing an international criminal court. According to the Canadian Representative, "There is clearly not now an international consensus on the need for such an initiative."⁹³

Despite these statements, room for improvement exists within the system. There have been cases, particularly those dealing with terrorists and major narcotics traffickers, in which corruption or lack of capacity or political will have caused domestic prosecution and bilateral cooperation to fail. This article next explores the ways in which an international criminal court might facilitate the prosecution of international criminals in these cases.

1. *Facilitating the Prosecution of Terrorists and Major Narcotics Traffickers.* When extradition proceedings are put in a political context due to the nature of the offense or of the group to which the fugitive belongs, or when terrorist acts are committed during the proceedings for the purpose

5 (duty to establish jurisdiction), Art 6 (duty to apprehend), Art 8 (duty to prosecute or extradite), Art 11 (duty to provide judicial assistance).

90. For example, none of the conventions cover one of the tactics most often used by terrorists—the deliberate targeting by bombs or other weapons of the civilian population.

91. See Address by Undersecretary of State Robert Kimmitt at the Meeting of the District of Columbia Bar Committee on Law and National Security 5-6 (July 27, 1990) (copy on file with L/LEI).

92. Statement by Teng Chengyuan, Representative of the Peoples Republic of China to the UN Sixth Committee, on November 13, 1989 at 3, United Nations Press Release, UN Doc GA/L/2635 (1989).

93. Statement by Richard Tetu, Representative of Canada to the UN Sixth Committee, on November 8, 1990 at 1. See also Statement by John Knox at 4 (cited in note 67). ("Of course, we are always interested in possible means of improving the prosecution of international crimes. But it is still not clear to us that the Court would contribute to the existing system.")

of preventing extradition of the accused, political pressures can "force nations to abandon legal principles and international duties in favor of domestic policy."⁹⁴ According to Senator Arlen Specter:

Terrorists continue to get away with murder by playing one nation against another, avoiding extradition, escaping prosecution and even securing their freedom by blackmailing powerful countries. The fight against terrorism would be tremendously aided by an international court to try these international criminals.⁹⁵

While Senator Specter may overstate the case for an international criminal court, the availability of a third option to trial in domestic courts or extradition may, in itself, be of value where states wish to accommodate their international duties, but are reluctant to extradite a fugitive for fear of diplomatic, political, or security-related consequences.

In the last three years, there have been two celebrated cases in which countries have bowed to such pressure in refusing to extradite terrorists to the United States for prosecution. The first case involved the United States' request to West Germany for the extradition of Mohammed Ali Hamadei and other Palestinian terrorists who, in 1985, hijacked Trans World Airlines ("TWA") Flight 847; held thirty-nine U.S. passengers hostage, and killed U.S. Navy diver Robert Stethem.⁹⁶

Shortly after the United States formally requested Hamadei's extradition, members of his terrorist organization took two West German businessmen hostage in Beirut in an effort to coerce the West German Government into denying the extradition request.⁹⁷ For the next five months, a diplomatic tug-of-war developed between the United States and West Germany, with the United States applying intense pressure on Chancellor Helmut Kohl's government for Hamadei's extradition.⁹⁸ Despite the diplomatic efforts of its close ally, the West German Government announced on June 24, 1987, that it would prosecute Hamadei itself rather than extradite him to the United States.⁹⁹

The second case involved another Palestinian terrorist, Mohammed Rashid, who allegedly planted a bomb on a Hawaii-bound Pan American airliner in 1982. The bomb killed a Japanese teenager and injured fifteen other passengers.¹⁰⁰ After the United States requested Rashid's extradi-

94. Comment, *The Attempted Extradition of Mohammed Hamadei: Discretion and the U.S.-West German Extradition Treaty*, 8 Wis Intl L J 123, 151 (1989).

95. Arlen Specter, *A World Court for Terrorists*, New York Times 4:27 (July 9, 1989).

96. See Comment, 8 Wis Intl L J at 123 (cited in note 94).

97. Id at 149.

98. See id at 149-50.

99. Id at 150 (citing Press Release, West German Government, June 24, 1987). Hamadei was ultimately convicted in West Germany and sentenced to life imprisonment. Id at 163-64.

100. *Greece will Not Extradite Palestinian Guerrilla to U.S.*, Reuter Library Report (September 13, 1990) (NEXIS, Intl file).

tion from Greece in 1988, the Greek Supreme Court ruled that he was extraditable.¹⁰¹ In Greece, as in the United States, the final decision rests with the Executive Branch. However, the failure of any political party to gain a majority in the elections held in June and November 1989, delayed the Executive Branch's decision for over a year.¹⁰² While the United States continued to urge Rashid's extradition, the Palestinian Liberation Organization, which has a sympathetic following in Greece, warned the successive Greek governments that extraditing Rashid to the United States would damage their relations.¹⁰³ As with the German Government in the Hamadei case, the Government of Greece ultimately denied the United States' extradition request, deciding that it was more politically expedient to try Rashid in Greece than to extradite him to the United States.¹⁰⁴

As these two recent cases indicate, governments often face intense domestic pressure not to extradite terrorists. Although these cases demonstrate the effectiveness of the existing system in requiring states to prosecute if they do not extradite, a decision not to extradite in a case involving a major terrorist incident has potentially two negative repercussions. First, it may strain relations between the requesting and requested states. This provides some support for the ILC's statement that "the international criminal court, in providing recourse to a third-party dispute mechanism, would contribute to the prevention and settlement of international conflicts and thus to the maintenance of international peace and security."¹⁰⁵

The second negative consequence of a decision not to extradite is that it frequently makes obtaining a conviction in the case more difficult, especially when the evidence is not located in the country that decides to prosecute rather than extradite the offender. Moreover, the possibility of a successful prosecution is diminished when prosecution is undertaken by

101. *Id.*

102. *Palestinian Guerrilla Wanted in U.S. May be Tried in Greece*, Reuter Library Report (March 14, 1990) (NEXIS, Intl file).

103. *Id.*

104. *Greece Will Not Extradite Palestinian Guerrilla To U.S.* (cited in note 100). In an earlier case involving Abdel Osama al-Somar, a member of the Abu Nidal terrorist organization who had bombed a synagogue in Rome, killing a two-year-old child and wounding thirty-six other persons, the Government of Greece denied Italy's extradition request despite the Greek Supreme Court's finding that al-Somar was extraditable. Nathan Adams, *Greece: Sanctuary of International Terrorism*, Readers Digest 199, 200 (June 1989). Unlike the Rashid case, al-Somar's offense, planting a bomb in a synagogue, was not covered by any international convention and the Greek Government chose to set the fugitive free rather than undertake its own prosecution. *Id.* Following the al-Somar case, the United States issued an advisory to its citizens to stay away from Greece, saying the country was "soft on terrorism." *Greece Frees Palestinian Guerilla Suspect by Italy*, Reuter Library Report (December 6, 1988) (NEXIS, Intl file).

105. 1990 ILC Report at ¶ 120 (cited in note 6).

the country that fortuitously happens to find the perpetrator within its territory rather than the country with the predominant interest in the offense (for example, the act occurred within its territory, its aircraft was hijacked, its citizens were among those killed or injured). Such a country is less likely to invest the money, time, and human resources necessary for a vigorous prosecution. Finally, where the prosecuting country has yielded once to domestic or other pressures in denying extradition, further political intervention to prevent a trial or conviction or to reduce the punishment becomes a very real risk.

This type of situation is evolving with regard to the "narco-terrorists" of Colombia and other countries. The Colombian drug barons of the Medellin and Cali cartels earn approximately US \$2-4 billion a year from cocaine trafficking (a sum that exceeds the gross national product of many countries).¹⁰⁶ They have used their immense wealth to organize private armies, purchase sophisticated weapons, and "bribe, intimidate, and terrorize the Colombian justice and political systems."¹⁰⁷ This has led to the virtual collapse of Colombia's judicial system; approximately fifty judges have been murdered and hundreds of others have resigned during the last ten years.¹⁰⁸ For these reasons, it has become, according to the ABA, "simply impossible to prosecute drug lords in Colombia today."¹⁰⁹

By August 1989, conditions had become so dismal that the President of Colombia, Virgilio Barco Vargas, exercising the presidential decree powers available to him under the state-of-siege provisions of the Colombian Constitution, established an administrative procedure for expedited extradition of Colombian narco-traffickers wanted abroad.¹¹⁰ Since then, twenty-two Colombian trafficking suspects have been extradited to the United States for trial.¹¹¹ In August 1990 a new President of Colombia, Cesar Gavira Trujillo, took office. In the face of rapidly weakening political backing for extradition of Colombian narco-traffickers¹¹² and the Colombians' increasing resentment of the pressure applied by the United States to enforce domestic drug laws,¹¹³ Trujillo stated in his inauguration address that one solution was to "create an international or regional crim-

106. Bruce M. Bagley, *Dateline Drug Wars: Colombia: The Wrong Strategy*, 77 Foreign Policy 154, 154 (Winter 1989-90).

107. *Id.*

108. *Id.* at 166.

109. 1990 ABA Report at 285 (cited in note 33).

110. Bagley, 77 Foreign Policy at 155 (cited in note 106).

111. James Brooke, *Colombia Leader Emphasizes Anti-Terrorism*, New York Times 1:6 (August 12, 1990).

112. See Douglas Farah, *Colombia's President Denies Pact With Drug Lords*, Washington Post A:8 (December 22, 1990).

113. See Brooke, *Colombia Leader Emphasizes Anti-Terrorism* at 6 (cited in note 111).

inal jurisdiction to fight narco-trafficking and other related crimes that surpass international borders.”¹¹⁴ He added that “extradition of Colombian drug suspects to the United States for trial cannot [continue to] be the principal tool of the war against drug trafficking.”¹¹⁵

Even when a government has the capacity and political will to conduct its own trial of terrorists or drug barons, it may find it necessary to increase its control through non-democratic means when faced with rampant politically motivated violence. Recent anti-terrorist legislation in many countries reflects such efforts.¹¹⁶ The danger of such a response is that it frequently results in the curtailment of fundamental rights and freedoms. For example, in response to growing Irish Republican Army violence, the United Kingdom enacted the Emergency Protections Act of 1973 enabling the “Diplock courts,” which try terrorist cases in Northern Ireland, to relax the procedural safeguards in place in most common law jurisdictions that provide for a fair trial.¹¹⁷ These tribunals, characterized by some as “kangaroo courts,”¹¹⁸ have been criticized for admitting into evidence the uncorroborated testimony of paid informants known as “supergrasses” who have been granted immunity for their own crimes.¹¹⁹ They also have been criticized for admitting into evidence almost any confession, even where the defendant can show that it was coerced.¹²⁰ By serving as an alternative forum for the trial of such individuals (a forum that is distanced from the terror-violence prevalent at the site of domestic courts), an international criminal court could preserve the rights of the accused and, at the same time, reduce a country’s need to introduce repressive measures.

In sum, for countries whose governments lack the capacity or will to extradite or prosecute terrorists or major narco-traffickers, the availability of an international criminal court could facilitate the prosecution of such criminals abroad while easing political tensions associated with extradition to the United States. For those countries who can effectively under-

114. Supplemental Statement of Senator Arlen Specter at 3 (cited in note 5).

115. James Brooke, *Colombia Swears in President, a Foe of Traffickers*, New York Times A:3 (August 8, 1990).

116. See Christine Van den Wijngaert, *The Political Offense Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* 227 (Kluwer, 1980).

117. See Thomas P. Foley, *Public Security and Individual Freedom: The Dilemma of Northern Ireland*, 8 Yale J World Pub Ord 284 (1982).

118. Note, *Foreign Courts on Trial: Why United States Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 Stan J Intl L 257, 278-79 (1988), quoting Senator Alfonse D’Amato, 132 Cong Rec S9154 (July 16, 1986).

119. Id.

120. Id. See also Note, *Extradition: Limitation of the Political Offense Exception*, 27 Harv Intl L J 266, 274 (1986) (quoting statements of Charles E. Rice, Christopher H. Pyle and Steven Lubet before the Senate Committee on Foreign Relations, September 18, 1985).

take their own prosecutions, the existence of an international criminal court may provide an alternative to curtailing fundamental rights inherent in their judicial systems. These potential benefits of an international criminal court motivated Trinidad and Tobago and several other Caribbean and Central American countries to introduce Resolution 44/39.¹²¹ However, there is still no consensus among experts that such benefits would actually materialize. Although an international criminal court might relieve states of some of the burden of having to act directly, those states still would have to summon the political will to turn an individual over to such a tribunal for prosecution. The existence of a forum other than the United States for the trial of terrorists and narco-traffickers initially may seem very attractive to a number of countries. However, if it is the evasion of justice that those being prosecuted seek, and not simply evasion of the United States justice system,¹²² the benefits of an international criminal court with respect to facilitating the prosecution of such individuals may never materialize.¹²³

2. *A Means of Eliminating the Political Offense Exception to Extradition.* A second potential benefit of the creation of an international criminal court is the possibility that such a court could be a vehicle for eliminating or narrowing the political offense exception to extradition of individuals who are accused of violent crimes. Under the political offense exception, the courts of a requested state will deny extradition of a fugitive who has committed an offense of a political character.¹²⁴ A judicial finding that an offense is political literally "paralyzes the [prosecute or extradite] sys-

121. See Statement by Marjorie R. Thorpe at 3 (cited in note 6). UN GA Res 44/39 is cited in note 34.

122. On the other hand, since justice for terrorists and narco-traffickers is particularly stringent in the United States, international criminals may not resist prosecution in an international court if they believe they are less likely to be convicted or, if convicted, that they would receive a shorter sentence. See generally Sharon LaFraniere, *U.S. Has Most Prisoners Per Capita in the World*, Washington Post at A:3 (January 5, 1991). (Lafraniere states that the United States now has the highest incarceration rate in the world due to stiffer sentencing over the past decade.)

123. Speaking to this issue before the U.N. Sixth Committee, the United Kingdom Representative recently stated: "We doubt very much whether the establishment of an international criminal court would help in the drug war. Combatting it needs more effective enforcement at the national level and greater cooperation at the international level." Statement by Sir Arthur Watts, Representative of the United Kingdom to the UN Sixth Committee, on November 8, 1990 at 3.

An international criminal court is more likely to be effective when a country lacks an interest in prosecution (or when it lacks the evidence to mount an effective prosecution) and when extradition to the state with such an interest is impossible (because of lack of an extradition treaty) or undesirable (for example, because of concerns about the fairness of the requesting country's criminal justice system). In such situations, the option of turning the case over to a neutral international adjudicative body might seem very attractive.

124. While the wording varies between treaties, most extradition treaties provide that extradition shall not be granted if the requested party regards the offense as political in character, or if the person sought proves that the request for his extradition reflects a desire to try or punish him for an offense

tem."¹²⁵ This has occurred all-too-frequently in cases involving terrorist offenses.¹²⁶

There are two modern justifications for the political offense exception to extradition: (1) the humanitarian concern for a fugitive who might not get a fair trial in cases of offenses that have political overtones,¹²⁷ and (2) the desire to avoid taking sides in another state's domestic conflicts (the neutral rationale).¹²⁸ A third justification for the exception, the legitimization of revolutionary uprisings by democratic forces in the face of totalitarian regimes,¹²⁹ is largely inapplicable to violent crimes in the modern geopolitical situation.

With the modern spread of terror-violence, the United States and its "stable democratic allies" have begun to negotiate supplementary extradition treaties which exempt violent crimes from the political offense exception to extradition.¹³⁰ Similarly, eight European countries have accepted

of a political character. See Convention on Extradition [US-Israel], [1963] 14 UST 1707, TIAS No 5476 (signed December 10, 1962; in force December 5, 1963).

125. Van den Wijngaert, *The Political Offence Exception to Extradition* at 218 (cited in note 116).

126. For example, during the last eleven years, U.S. courts have denied four different extradition requests by the United Kingdom on grounds that the offenses were political. These requests were denied for extradition of members of the Provisional Irish Republican Army ("IRA"), who were accused or convicted of committing acts of violence. See *In Re McMullen*, Magis No 3-78-1099 MG (ND Cal 1979) (IRA bombing of a military barracks), reprinted in *Extradition Act of 1981: Hearings on S 163 before the Senate Committee on the Judiciary*, 97th Cong, 1st Sess 294 (1981); *United States v Mackin*, 668 F2d 122 (2d Cir 1981) (attempted murder of a British soldier in Belfast by a member of the IRA); *Matter of Doherty*, 599 F Supp 270 (SD NY 1984) (IRA attack on a convoy of British soldiers in Northern Ireland); *Quinn v Robinson*, No C-82-6688 RPA (ND Cal 1983), rev'd, 783 F2d 776 (9th Cir 1986) (IRA conspiracy to cause bomb explosions and the murder of a police constable).

127. See James L. Taulbee, *Political Crimes, Human Rights and Contemporary International Practice*, 4 *Emory Intl L Rev* 43, 46 (1990). According to Ruth Wedgewood, Associate Professor of Law, Yale Law School: "If you return someone to a country where he has committed a crime when he is a known opponent of the regime or has acted with political motives, the regime may be tempted to take liberties with the evidence, to give him an unduly harsh punishment, or to use extralegal means altogether. While [the requested state] can seek diplomatic assurances that such will not happen, there is never a complete guarantee. Even when his offense is properly criminal, there is always a lingering worry that the person's very political prominence may put him in jeopardy." *Extradition and the Political Offense Exception*, American Society of International Law: Proceedings of the 81st Annual Meeting 467, 472 (1987) (Remarks by Ruth Wedgewood).

128. *Extradition and the Political Offense Exception* at 472 (cited in note 127).

129. See Van den Wijngaert, *The Political Offense Exception to Extradition* at 8-10 (cited in note 116).

130. The first such treaty to come into force is the Supplementary Extradition Treaty between the United States and the United Kingdom, S Treaty Doc No 99-8, 99th Cong, 2d Sess 15-17 (signed June 25, 1985; in force December 23, 1986), reprinted in 24 ILM 1104 (1985). The United States has also signed, but has not yet ratified, similar treaties with West Germany and Belgium. See Supplemental Treaty Concerning Extradition [United States-West Germany] (signed October 21, 1986), reprinted in *International Terrorism: A Compilation of Major Laws, Treaties, Agreements, and Executive Documents*, prepared for the House Committee of Foreign Affairs, 100th Cong, 1st Sess 321 (Comm Print 1987); Supplemental Treaty on Extradition to Promote the Repression of Terrorism [United States-Belgium] (signed March 17, 1987). *Id* at 317.

without reservation the European Convention on the Suppression of Terrorism, which limits the scope of the political offense exception by specifying that certain violent crimes (aircraft hijacking or sabotage, attacks against diplomats, hostage taking, kidnapping, use of explosives and automatic firearms) do not qualify as political offenses for purposes of extradition to the convention's state parties.¹³¹ Yet, broader international attempts to eliminate or narrow the political offense exception have met so far with little success.

The justifications for the political offense exception generally would not apply to trials conducted by an international court. The trial presumably would not be controlled by a state with a political interest in the outcome. While compliance with an extradition request may appear to be taking sides,¹³² surrender of a fugitive to a more neutral body is less likely to be so perceived. Countries might therefore find it acceptable to subscribe to a mechanism for surrender of fugitives to an international criminal court that does not include a political offense exception for certain violent crimes. Thus, establishment of an international criminal court, absent such an exception, may be a positive step toward achieving the goal of international criminal responsibility.

3. "To an International Crime Must Correspond an International Jurisdiction."¹³³ The ILC has been working on a Draft Code of Offences Against the Peace and Security of Mankind since 1947.¹³⁴ To date, the Commission has completed eighteen draft articles; the three most recent concern international terrorism, mercenaries, and illicit traffic in narcotics.¹³⁵ After years of vacillation, the ILC and the U.N. Sixth Committee have reached a consensus that some form of international criminal juris-

131. European Convention on the Suppression of Terrorism, Eur Treaty Ser No 90 (signed January 27, 1977; in force August 4, 1978), reprinted in 15 ILM 1272 (1976). See Letter from William Ball, III, Assistant Secretary of State for Legislative Affairs to Richard G. Lugar, Chairman of the Senate Committee on Foreign Relations 31 (September 12, 1985) (copy on file with L/LEI). The eight countries are: Austria, Germany, Liechtenstein, Luxembourg, Portugal, Spain, Turkey, and the United Kingdom. *Id.* at 1.

132. See notes 94-115 and accompanying text.

133. In 1925, the French jurist J.A. Roux, speaking to the need for an international criminal court, stated: "Time works for it, because history, justice and common sense stand by its side. To an international crime must correspond an international jurisdiction." *Question of International Criminal Jurisdiction*, Report of Ricardo J. Alfaro, Special Rapporteur of the International Law Commission, March 3, 1950, 4 UN GAOR A/CN.4/15 at ¶ 124, reprinted in Ferencz, *An International Criminal Court* at 256 (cited in note 18).

134. See Bassiouni Report at A:5 (cited in note 1); Draft Code of Offences against the Peace and Security of Mankind, July 28, 1954, 9 UN GAOR Supp No 46 at 11, UN Doc A/2693. See generally Johnson, *The Draft Code of Offences Against the Peace and Security of Mankind*, for both a discussion of the code and the text (cited in note 28). The Draft Code has been on the U.N. Sixth Committee agenda since 1979. Bassiouni Report at A:5 note 7.

135. 1990 ILC Report at ¶ 11 (cited in note 6).

diction must be established if the Draft Code is to be effective.¹³⁶ With respect to the Draft Code, the basic advantage of establishing an international criminal court would be the promotion of "uniform and consistent interpretation of the law."¹³⁷

There has not developed, however, a consensus in the U.N. Sixth Committee on the Draft Code itself. As the United States Representative recently remarked, "There has not been a consensus in the Sixth Committee since the topic [of the Draft Code] was revived. Those who press for the topic each year would do well to reflect on whether the long range prospects for the Code are enhanced by insisting on progress when the underlying consensus does not exist."¹³⁸ Specifically, there is still no agreement on such fundamental questions as the specific crimes that the Draft Code should cover or whether the scope of the code should include both individuals and states.¹³⁹ Moreover, the articles are not drafted with the specificity necessary for a viable criminal code.¹⁴⁰

Under one of the most controversial of the code's draft articles, "International Terrorism," an act "directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public . . ." is an international crime.¹⁴¹ This is nearly the same definition as that first proposed in the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism.¹⁴² The 1937 Convention has been followed by a number of other unsuccessful attempts to achieve international consensus on a definition of terrorism.¹⁴³ The essential problem with this approach, according to a U.S. State Department official, is that under this definition,

136. Statement by Patrick Robinson, Representative of Jamaica to the UN Sixth Committee, on November 7, 1990 at 10.

137. Statement by Dr. Husain M. Al-Baharna, Representative of Bahrain to the UN Sixth Committee, on November 6, 1990 at 1.

138. Statement by Christine Cervenak, Representative of the United States to the UN Sixth Committee, on November 1, 1989 at 1, USUN Press Release 130-(89), November 3, 1989 (copy on file with L/LEI).

139. See Statement by John Knox at 2 (cited in note 67). For a history of past failed attempts to achieve international agreement on a definition of terrorism, see Levitt, 13 Ohio N U L Rev at 97 (cited in note 15).

140. See Statement by John Knox at 2 (cited in note 67). Such ambiguously drawn offenses are unjust to the extent that individuals are not adequately apprised of the substance of the crimes, and, for this reason, they could conflict with the United States Constitution's due process provisions were the United States ever to adopt the Draft Code.

141. 1990 ILC Report at ¶ 158 (draft Art 16) (cited in note 6).

142. The League of Nations Convention defined "acts of terrorism" as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." League of Nations Convention at Art 1(2) (cited in note 14).

143. See Levitt, 13 Ohio N U L Rev at 99-101 (cited in note 15).

"[o]ne man's terrorist is another man's freedom fighter, and one man's terrorist may be another man's head of state."¹⁴⁴

This lack of consensus has prompted the ILC¹⁴⁵ and some of the U.N. Sixth Committee's Representatives to note that the international criminal court should be pursued independent of the Draft Code. As the U.S. Representative remarked, "A Code without a Court would seem unhelpful, but a Court could perhaps be of use without a Code."¹⁴⁶ The wide range of offenses already outlawed by international conventions would provide ample subject-matter jurisdiction for an international criminal court.¹⁴⁷ If the Draft Code is ever completed, the court's jurisdiction could be extended to cover the additional offenses proscribed by the code.

While the establishment of the Draft Code does not, therefore, necessitate efforts to pursue the creation of an international court at this time, the fact that some international crimes are inappropriate for domestic trial is a compelling justification, especially in light of recent developments in the Persian Gulf, for pursuing the establishment of such a court. Referring to the actions of Iraqi President Saddam Hussein, the Representative of the United Kingdom to the U.N. Sixth Committee recently remarked:

We are all aware of the blatant aggression against a Member State and its purported annexation, and of a whole series of very serious breaches of international law associated with those events. . . . It must be made clear that personal responsibility attaches to individuals for crimes such as these. . . . [T]hese serious breaches of international law by individuals have given a new impetus to the debate on the question of the possible establishment of an international criminal court. . . . As we see it, the basic justification for an international criminal jurisdiction must be that there are international crimes which cannot be dealt with effectively by any other means. Examples of these might be those high

144. Avram Goldstein, *Crimes of War*, Detroit News 4:B (January 27, 1991). The persistent failure to agree on a definition of terrorism prompted the international community to conclude a series of individual conventions that specify certain limited categories of offenses, such as aircraft hijacking, aircraft sabotage and hostage taking, that are criminal whether or not they could be described as "terrorist." Levitt, 13 Ohio N U L Rev at 101 (cited in note 15).

145. See 1990 ILC Report at ¶ 125 (cited in note 6).

146. Statement by John Knox at 3 (cited in note 67). See also Statement by Patrick Robinson at 10 (cited in note 136) for the proposition that "in view of the length of time that will be involved in work on the Code, it would be prudent for the Committee to consider the establishment of some international trial mechanism that would operate independently of the Code in relation to certain agreed offenses."

147. For a list of such offenses and applicable international conventions, see notes 73-89 and accompanying text.

crimes, such as waging aggressive war, crimes against humanity and such like.¹⁴⁸

If the purpose is limited to bringing foreign leaders to trial for war crimes, genocide, or crimes against humanity,¹⁴⁹ this could be accomplished through an *ad hoc* tribunal with narrowly drawn jurisdiction covering a specified group of individuals charged with specified crimes. Although such *ad hoc* tribunals pose a number of difficulties of their own,¹⁵⁰ they would avoid some of the more substantial problems inherent in a standing international criminal court with broader jurisdiction.

B. Problems Posed by the Creation of an International Criminal Court

The establishment of an international criminal court involves a number of difficult problems. These include gaining the acceptance of jurisdiction by all states having an interest in prosecuting a particular case and ensuring that the court would not disrupt the existing prosecute or extradite system. In addition, creating such a court would require consensus on numerous practical issues such as the methods for conducting investigation and prosecution, rules of evidence, procedure and fair trial guarantees, and the mechanism for pre-trial and trial detention and post-conviction incarceration.

1. *The Need for an Acceptable Jurisdictional Scheme.* Perhaps the most difficult obstacle to the establishment of an international criminal court is the need to formulate a jurisdictional arrangement that would overcome states' general reluctance to submit themselves or their nationals to the jurisdiction of an international authority.¹⁵¹ The three most promising proposed options are exclusive jurisdiction, concurrent jurisdiction, and transfer of jurisdiction.¹⁵²

148. Statement by Sir Arthur Watts, Representative of the United Kingdom to the UN Sixth Committee, on November 8, 1990 at 1-3 (cited in note 123).

149. There have been proposals to try not only Iraq's Saddam Hussein, but also Pol Pot and other Khmer Rouge leaders for the genocide of one million Cambodians between 1975 and 1979. See *Khmer Rouge Trials Sought*, Washington Post A:12 (January 9, 1991).

150. One such difficulty is that trial of foreign leaders might lead to reciprocal efforts to try U.S. leaders for acts ranging from the 1986 bombing of Libya to the 1989 invasion of Panama.

151. A major obstacle to the establishment of an international criminal court is the unwillingness of many states, including perhaps the United States, to allow an international criminal court to exercise jurisdiction over their nationals. [G]iven the general reluctance of states to submit themselves or their nationals to the jurisdiction of an international authority, it is highly questionable whether the creation of an International Criminal Court could at this point in time achieve acceptance by a sufficient number of states to be an effective and worthwhile endeavor. 1990 ABA Report at 286 (cited in note 33). State Department Report at 2 (cited in note 11).

152. Another proposed option, an international court having only review competence, is beyond the scope of this article. See 1990 ILC Report at ¶ 130-33 (cited in note 6). A court with jurisdiction

The exclusive (or compulsory) jurisdiction approach requires states to relinquish their jurisdiction with regard to crimes coming under the jurisdiction of the international criminal court. Under this approach, the court's jurisdiction could extend to all offenses covered by existing international conventions, or in the alternative, the scheme would allow each state party to confer competence upon the court over certain select offenses covered by international conventions. National courts would be precluded from exercising jurisdiction with regard to offenses over which the international criminal court has jurisdiction.¹⁵³

The advantage of the exclusive jurisdiction approach is that, in theory, "a single court with exclusive jurisdiction would [be] conduc[ive] to the development of a coherent and consistent body of law. . . ."¹⁵⁴ The disadvantage is that, of the three options, the exclusive jurisdiction approach requires the most significant curtailment of national sovereignty. It would require countries to relinquish, in advance, their authority to undertake domestic prosecutions with respect to certain categories of crime, which they traditionally have been unwilling to do.¹⁵⁵ Moreover, this approach may raise problems with existing treaty obligations under conventions providing for "universal jurisdiction under national tribunals."¹⁵⁶ Specifically, the state's obligation to surrender a fugitive to the jurisdiction of the international criminal court would be in conflict with its obligations either to extradite the fugitive to a third state or to undertake its own prosecution.

Under the concurrent (or optional) jurisdiction approach, a state chooses whether to institute an action before a domestic court, or to extradite the offender to another state for prosecution, or to institute an action before the international court.¹⁵⁷ While this approach may not offer the benefit of uniformity of application provided by the exclusive jurisdiction approach,¹⁵⁸ it would overcome many of the disadvantages inherent in the concept of exclusive jurisdiction. Countries would not be compelled to turn over alleged offenders to the international court, and thus would preserve their sovereign powers under existing domestic law and international conventions. While a court of compulsory jurisdiction would replace the current prosecute or extradite scheme, a court with optional jurisdiction would co-exist with and supplement the existing sys-

only to re-examine decisions of national courts on international crimes would not meet the needs for an international criminal court discussed in notes 94-150 and accompanying text.

153. *Id.* at ¶ 131.

154. Statement by Patrick Robinson at 13-14 (cited in note 136).

155. See State Department Report at 2 (cited in note 11).

156. 1990 ILC Report at ¶ 155 (cited in note 6).

157. See *id.* at ¶ 132.

158. *Id.*

tem. It is not surprising that many of the representatives to the U.N. Sixth Committee expressed a preference for the latter approach.¹⁵⁹

The major disadvantage of the concurrent jurisdiction approach is that it could lead to conflicts of jurisdiction between states having an interest in the case.¹⁶⁰ Under many of the international prosecute or extradite conventions, more than one state might simultaneously have jurisdiction over the offense. For example, the state in whose territory the offense is committed, the state against which the offense was directed, the state of which the offender is a national, the state of which the victim is a national, and the state in whose territory the offender is found, could assert jurisdiction.¹⁶¹

The 1990 ILC *Report* states that means will have to be devised to overcome difficulties that might arise when one state with jurisdiction wants the action brought before the international criminal court and another state with jurisdiction wants the action brought before its own domestic court.¹⁶² As a means of avoiding such conflicts, the ILC has proposed either requiring the consent of all states which have an interest in the case or requiring authorization either of the General Assembly or the Security Council of the United Nations before a case may be submitted to the international criminal court.¹⁶³ Favoring a variation on the first of these alternatives, the International Section of the ABA proposed that jurisdiction be conferred upon the international court by both the state where the crime is alleged to have been committed and the state of which the accused is a national.¹⁶⁴ Since most domestic jurisdiction is based on the territorial principle,¹⁶⁵ requiring the consent of the state in whose territory the crime was alleged to have been committed could minimize conflicts of jurisdiction between the international criminal court and the national courts. Further, requiring permission from the state of the accused's nationality would protect the sovereignty of states and decrease the likelihood that trials involving discussion of sensitive national policy

159. See Statement by Sven-Erik Christoffersen, Representative of Norway to the UN Sixth Committee, on November 6, 1990 at 6; James Crawford, Representative of Australia to the UN Sixth Committee, on November 6, 1990 at 2. But see Statement by Patrick Robinson at 14 (cited in note 136) for the proposition that "[a] system of concurrent jurisdiction whereby a choice may be made of either a national court or the international criminal court is not to be encouraged; it would not facilitate the development of a coherent and consistent body of law."

160. 1990 ILC *Report* at ¶ 155 (cited in note 6).

161. See, for example, Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (cited in note 85); Convention for the Suppression of Unlawful Seizure of Aircraft (cited in note 86).

162. 1990 ILC *Report* at ¶ 132 (cited in note 6).

163. *Id.* at ¶ 136.

164. See 1990 ABA *Report* at 286 (cited in note 33).

165. Van den Wijngaert, *The Political Offence Exception to Extradition* at 225 (cited in note 116).

issues would take place without the state's consent.¹⁶⁶ Unless countries agree in advance to exercise moderation and restraint in withholding consent, such requirements will reduce substantially the likelihood that a particular case will reach the international criminal court.

The committee of scholars which met in Siracusa, Italy, in June 1990 have proposed a third jurisdictional option that would be "in the nature of a transfer of criminal proceedings," modeled upon the European Convention on the Transfer of Proceedings in Criminal Matters ("European Convention").¹⁶⁷ These scholars assert that under such an approach the state with original jurisdiction "would not lose jurisdiction, but merely transfer the criminal proceedings to the Court."¹⁶⁸ They suggest, therefore, that this approach would avoid "some major jurisdictional and sovereignty problems" inherent in the other approaches.¹⁶⁹ The scholars also suggest that this approach would enable the international criminal court to "use the substantive law of the transferring state"¹⁷⁰ to provide greater flexibility with respect to the range of offenses that the international court could try.¹⁷¹

Closer scrutiny reveals that the transfer of proceedings approach is unlikely to provide such benefits. First, this approach does not eliminate the need for an extradition relationship with an international criminal court and therefore does not avoid the jurisdictional and sovereignty problems discussed above. Under the European Convention, which introduced the transfer of proceedings approach, a country (the transferring state) can transfer criminal proceedings to another (the receiving state) only when the receiving state has or can obtain *in personam* jurisdiction over the accused.¹⁷² The primary function of the convention has been to ensure prosecution of criminals who (1) commit violations of the transferring state's laws, (2) are nationals of the receiving state, (3) are present in the receiving state, and (4) can not be extradited to the transferring state

166. Statement by Marjorie R. Thorpe at 5 (cited in note 6).

167. See *Bassiouni Report* at B:6 (cited in note 1). The European Convention on the Transfer of Proceedings in Criminal Matters, Eur Treaty Ser No 73 (signed May 15, 1972; in force March 30 1978), has been ratified by Austria, Denmark, The Netherlands, Norway, Sweden, and Turkey. Chart Showing Signatures and Ratifications of Conventions and Agreements Concluded Within the Council of Europe, Council of Europe, Dir/Jur 87(8) (December 17, 1987).

168. *Bassiouni Report* at B:6 (cited in note 1).

169. *Id.*

170. *Id.*

171. See Blakesley, 6 Intl Enforcement L Rptr at 253 (cited in note 36).

172. See European Convention on the Transfer of Proceedings in Criminal Matters at Art 8 (cited in note 167). The U.S. jurisprudential concept of *in personam* jurisdiction can be inferred from the specific requirements for transfer in Article 8.

to stand trial because the receiving state's laws do not permit extradition of its own nationals.¹⁷³

The European Convention triggers prosecution of the accused in the receiving state and provides for a transfer of the evidence against the accused; it does not provide for the transfer of the accused himself. Since fundamental principles of fairness require the presence of the accused at trial before an international criminal court,¹⁷⁴ a functional extradition relationship must exist between the states and the court to bring the accused to trial before such a tribunal. A transfer of proceedings arrangement alone would not suffice for this purpose.

Moreover, under a transfer of proceedings approach based on the European Convention, the international criminal court could try a case only if the offense is within its subject matter jurisdiction, as set out in its statute. The European Convention does not provide for prosecution in the receiving state based solely on the law of the transferring state. Rather, it requires that the offense be one that the receiving state would regard as criminal if committed in its own territory.¹⁷⁵ The transfer of proceedings approach would not obviate the need to reach agreement on the specific offenses for which the international criminal court would have subject matter jurisdiction.

Finally, a modified transfer of proceedings approach under which, unlike the European Convention, the transferring state does not lose jurisdiction and the international criminal court merely applies the law of the transferring state, might run afoul of the United States Constitution.¹⁷⁶ The potential constitutional objection would arise under Article III, Section 1, which provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at

173. Many countries' laws do not permit the extradition of their own nationals. For example, the Netherlands Extradition Act of March 9, 1967, Bulletin of Acts, Orders and Decrees (Staatsblad 139), as last amended by the Act of September 10, 1987 (Staatsblad 98) at § 4(1), provides that "[n]ationals of the Netherlands shall not be extradited." Consistent with such laws, the extradition treaties between many countries provide that the parties shall not be bound to extradite their own nationals. See, for example, the Treaty and Exchange of Notes Between the United States of America and Austria Concerning Extradition and Commutation of Death Penalty, 46 Stat 2779, Treaty Ser No 822 at Art 8 (1930) which provides that "[n]either of the High Contracting Parties shall be bound to deliver up its own citizens."

174. Blakesley, 6 Intl Enforcement L Rptr at 255 (cited in note 36). For a listing of the conventions upon which these fundamental principles of fairness rest, see id at 257 note 17.

175. European Convention on the Transfer of Proceedings in Criminal Matters at Art 7 (cited in note 172).

176. See Louis Henkin, *Foreign Affairs and the Constitution* 198-99 (Foundation Press, 1972).

stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The modified transfer of proceedings approach might contravene this provision because the international criminal court would exercise the judicial power of the United States and apply U.S. law, despite the fact that it is not a tribunal established by Congress, and its judges are not appointed by the President with the advice and consent of the Senate, and are not assured of life tenure and undiminished compensation.¹⁷⁷

The above discussion demonstrates that the question of jurisdiction is likely to remain a considerable obstacle to the establishment of an international criminal court. All of the jurisdictional approaches have drawbacks. If the history of the Draft Code of Crimes Against the Peace and Security of Mankind is any indication, achieving international consensus on any single approach is likely to be a difficult and time-consuming task.

2. *The Danger of Disrupting the Existing System.* This article describes the existing system of international law enforcement and the ways in which it might be enhanced by the creation of an international court.¹⁷⁸ It also describes how one jurisdictional approach, that of exclusive jurisdiction, could conflict with treaty obligations under the existing prosecute or extradite framework.¹⁷⁹ Building on this foundation, this section examines the possibility, recognized by the ILC, that creating such a court could disrupt the existing system.¹⁸⁰ As the United States Representative to the U.N. Sixth Committee recently stated, "This is a real danger, and one that we believe should be considered very carefully."¹⁸¹

An initial concern is that the quest for the creation of an international court would "divert resources and attention away from more practical and readily achievable means for combatting international criminal activities."¹⁸² The international community's principal long term law enforcement objectives have been: (1) seeking acceptance by more countries of existing international conventions that contain the prosecute or extradite principle; (2) negotiating agreements to facilitate international legal assistance and cooperation; (3) ensuring adherence to the obligations of existing conventions by state parties; (4) refining the provisions of existing conventions to close gaps and loopholes where desirable; and (5)

177. See *id.* at 199.

178. See notes 72-150 and accompanying text.

179. See notes 155-156 and accompanying text.

180. 1990 ILC Report at ¶ 118 (cited in note 6).

181. Statement by John Knox at 4 (cited in note 67).

182. State Department Report at 3 (cited in note 11). Moreover, if established as an organ of the United Nations, as several representatives to the Sixth Committee have proposed, the additional financial burden would drain scarce resources from the already strained United Nations budget. See Statement by Dr. Husain M. Al-Baharna at 6 (cited in note 137).

adopting new conventions to reach specific areas not already covered by existing international conventions.¹⁸³ Continuing efforts to pursue the establishment of an international criminal court could preempt and obscure the progress already made in these five areas. "More serious even than the time wasted on an unpromising topic, is the time stolen from other more promising topics of more immediate potential benefit."¹⁸⁴

A second concern is that trial of terrorists in an international criminal court would run counter to current efforts to "deglamorize" terrorism by treating terrorists as common criminals. While prosecution in domestic courts advances this goal, prosecution before an international criminal tribunal would likely have the reverse effect.¹⁸⁵ The possibility of being tried before an international court, with accompanying publicity and prestige, could become an objective for future terrorists. It would be paradoxical if efforts to create an international court ultimately stimulated, rather than discouraged, international criminal activity. Perhaps this is a question for sociologists and psychologists rather than international lawyers; however, it is one that merits further attention.

A final concern is that the international criminal court "could develop into a politicized body, . . . interpreting crimes in unhelpful ways and releasing criminals who might no longer be prosecutable."¹⁸⁶ Judgments of the international criminal court could preclude a state from subsequently prosecuting or extraditing a suspected criminal for the same or a closely related offense arising out of the same facts.¹⁸⁷ An acquittal or light sentence handed down by the international criminal court could immunize the accused from further prosecution under the existing prosecute or extradite system. In a recent speech to the U.N. Sixth Committee, the United States Representative described this threat to the existing system:

Were we to create a court which turned out to be ineffective, such a court would not merely be an innocuous fixture on the international legal scene, but rather could very well prove harmful to that which we have already achieved. How dreadful and antithetical to the intentions of the proponents it would be if our good intentions created nothing more than a politically expedient dumping ground for politically sensitive cases.¹⁸⁸

Extraordinary efforts would be necessary to ensure that the international criminal court would not be subject to political currents and that its judges would be free from the inevitable political influences which so

183. See State Department Report at 3 (cited in note 11).

184. Statement by Christine Cervenak at 1 (cited in note 138).

185. See Statement by Jason Abrams at 2 (cited in note 9).

186. State Department Report at 2 (cited in note 11).

187. Statement by James Crawford at 2 (cited in note 159). Under the common law, this principle is known as "*autrefois acquit and autrefois convict*." *Id.*

188. Statement by Jason Abrams at 3 (cited in note 9).

often afflict other U.N. organs. As the Representative of Israel to the U.N. Sixth Committee observed:

Clearly, any state, before it chooses to concede its own criminal jurisdiction as regards any individual or group, which has committed against its people or its territory grave crimes, . . . would have to be fully confident that the international tribunal to be seized with such jurisdiction, would and could be completely capable of impartially shouldering that jurisdiction.¹⁸⁹

In order to ensure the neutrality of the bench, it has been suggested that each state appoint one judge to the court, that cases be tried before three-judge panels, and that the full court hear appeals *en banc*.¹⁹⁰ Though a sound start, these measures alone probably would not be sufficient to dispel serious concerns about the integrity of an international criminal court and its effect on the existing system.

3. *Other Practical Concerns.* The creation of an international criminal court would be an enormously complex matter, requiring consensus on a host of practical matters such as the court's composition, rules of procedure or evidence, standard of proof, substantive defenses, rights of the accused, appeal or collateral challenge and participation of individuals in the prosecution as *partie civile*. Most of these matters, although cumbersome, are neither insurmountable nor historically unique. They have been addressed in various forms through the creation of the International Court of Justice¹⁹¹ and the European Court of Human Rights,¹⁹² and, therefore, this article will not discuss them further. Some practical issues, however, are unique to an international criminal court and merit further examination. The most important of these (discussed below) pertain to who would conduct the investigation and prosecution of accused offenders and where these offenders would be incarcerated.

To be a truly neutral body, an international criminal court would require its own independent prosecuting machinery.¹⁹³ Moreover, the country submitting the case might not wish to be involved in the prosecution. Thus, it might object to, or block in the case of a concurrent jurisdictional approach, the participation of another interested country for the same reasons that led it to choose trial in the international criminal

189. Statement by Alan Baker, Representative of Israel to the UN Sixth Committee, on November 9, 1990 at 8.

190. *Bassiouni Report* at B:8-9 (cited in note 1).

191. See generally Statute of the International Court of Justice, 59 Stat 1031, Treaty Ser No 993 (signed June 26, 1945; in force October 24, 1945).

192. See generally European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (signed November 4, 1950; in force September 3, 1953).

193. See Statement by John Knox at 4 (cited in note 67); Statement by Dr. Husain M. Al-Baharna at 5 (cited in note 137).

court rather than domestic prosecution or extradition to the interested country. In addition, the international criminal court's prosecuting arm would have to satisfy common law countries, where public prosecutors are responsible for the criminal investigation and prosecution, and civil law countries, where prosecution is conducted by the judiciary.¹⁹⁴

The creation of an international court also might require the establishment of an international detention facility. What is needed, according to some, is "a modern-day Devil's Island on international territory."¹⁹⁵ Others believe that so long as international law depends upon national institutions for its enforcement, sentences should be carried out in the penal facilities of national systems rather than in an international detention facility.¹⁹⁶ Moreover, with regard to penalties, some have argued that the matter should be viewed in light of the penal policy prevalent in the state submitting a case,¹⁹⁷ while others advocate a framework similar to the United States federal sentencing guidelines, where the penalties for each crime are fixed in order to "promote greater uniformity and rationality in sentencing."¹⁹⁸

There are no specific proposals for dealing with, or assessing the costs of creating these international prosecution and penal mechanisms. Such issues, however, are not merely administrative details to be worked out at a later date. Rather, "[t]hey are fundamental, and must be answered before it is possible to decide whether the Court is worthwhile."¹⁹⁹

IV. CONCLUSION

Despite seventy years of study, many questions remain unanswered regarding the establishment of an international criminal court. Such a court would have the potential to provide an incremental benefit to the current international law enforcement system, especially in cases in which countries wish to accommodate their international duty to prosecute or extradite, but for a variety of reasons lack the wherewithal to do so. However, even if established, many of the professed benefits of this court may never materialize.

This article has analyzed the difficulties involved in establishing an international criminal court and the ways such a court might disrupt the existing system of international criminal law enforcement and detract

194. See Statement by Dr. Husain M. Al-Baharna at 5 (cited in note 137).

195. Arlen Specter, *A World Court for Terrorists*, New York Times 4:27 (July 9, 1989).

196. Statement by Dr. Husain M. Al-Baharna at 6 (cited in note 137).

197. See Statement by Alan Baker at 9 (cited in note 189).

198. Statement by Patrick Robinson at 15 (cited in note 136).

199. Statement by John Knox at 4 (cited in note 67).

from ongoing efforts to strengthen that system. Although there is no international consensus that the minimal benefits justify the expense and risks associated with establishing such a tribunal, the proposal has gained a great deal of momentum in the past year and is likely to continue to generate interest among legal scholars if not among governments.

While becoming a party to an international criminal court might be of little utility to the United States, proceedings before such a court are likely to affect U.S. interests, particularly where a country decides to surrender a fugitive to the international tribunal rather than to extradite the fugitive to the United States. There is value, therefore, in U.S. participation in the study and possible development of such a court so that it can influence the structure, procedures, and substance of whatever results.²⁰⁰

200. Blakesley, 6 Intl Enforcement L Rptr at 257 (cited in note 36).